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In the Supreme Court of the United States

OCTOBER TERM 1983

JAMES GAUDIO,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Court of Appeals for the Seventh Circuit sustaining a conviction for conspiracy to violate 18 USC §922(a)(1) and §923, which prohibits an unlicensed person to deal in firearms, based on evidence which, at most, demonstrated conspiracy to receive stolen firearms in violation of 18 USC §922(j), constitutes a fatal variance, in conflict with this Court's decisions interpreting due process requirements and presents such a departure from accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

2. Whether the decision of the U.S. Court of Appeals for the Seventh Circuit upholding the lower court's determination not to reveal the identity of an informant ignores the principle articulated by this Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957) creating a conflict.

3. Whether the decision of the U.S. Court of Appeals for the Seventh Circuit sustaining a conviction based on extensive evidence of extrinsic crimes not committed by Petitioner so far departed from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

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No.

JAMES GAUDIO,

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, JAMES GAUDIO, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A, attached hereto. The order of the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing appears as Appendix B, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 31, 1983. Petitioner filed a petition for rehearing, which was denied in an order entered on October 18, 1983. This petition is filed within sixty days of said order of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 USC §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th and 6th Amendments to the United States Constitution are herein involved. The 5th Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The 6th Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

On June 10, 1982, Petitioner and a co-indictee were charged in a multi-count indictment. Count 1 of the indictment charged Petitioner, the co-indictee, McKinness, and an unindicted co-conspirator, Heuton, with conspiracy to violate 18 USC §922(a)(1) and §923, in violation of 18 USC §371. Sec. 922(a)(1) prohibits, *inter alia,* any person, except a licensed dealer, from dealing in firearms. Sec. 923(a) provides, *inter alia,* that no person shall engage in the business of dealing in firearms until licensed by the Secretary of the Treasury. Count 2 of the indictment charged Petitioner with dealing in firearms when

not licensed by the Secretary of the Treasury as provided under 18 USC §923, in violation of 18 USC §922(a)(1). Count 7 of the indictment charged Petitioner with receiving stolen firearms knowing that the firearms were stolen, in violation of 18 USC §922(g). Prior to trial, co-defendant McKinness pled guilty.

At trial, the government presented testimony by several shopkeepers detailing the burglarization of their stores and itemizing the articles taken. The government also presented the testimony of unindicted co-conspirator Heuton, and other witnesses regarding Heuton and co-defendant McKinness' participation in the various burglaries. No evidence was presented that Petitioner participated in any of the burglaries.

In support of the government's theory that Petitioner dealt in stolen firearms, the government presented testimony that Petitioner handed a list of available weapons to prospective customers. The government introduced into evidence Government Exhibit 32, which purportedly was a list of available weapons written by Petitioner. To establish the foundation for admitting the exhibit, which was a crucial piece of evidence, the government presented the testimony of police officer Rizzardo. Officer Rizzardo testified outside the presence of the jury that Exhibit 32 is a copy of a list provided to him by a confidential informant, code name B.J. Dog. Officer Rizzardo testified that the confidential informant advised him that the list was prepared by Petitioner. On that basis, Exhibit 32 was admitted into evidence. The government then presented the testimony of Internal Revenue Service Agent Keckler before the jury. Agent Keckler compared the handwriting on the list with exemplars of Petitioner's handwriting.

Agent Keckler testified that a portion of Exhibit 32 was "probably" authored by Petitioner. Agent Keckler's testimony was inconsistent with the statements attributed to the confidential informant through police officer Rizzardo that Petitioner authored the entire list. Further, Agent Keckler was unable to testify that he was positive or a high probability existed that Petitioner authored any portion of the list. Petitioner, pursuant to his 6th Amendment right to confrontation and cross-examination, requested that the identity of the confidential informant be revealed. The Court refused to order the government to reveal the informant's name, thereby precluding cross-examination.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals, sustained a conviction for conspiracy to violate 18 USC §922(a)(1) and §923, which prohibit an unlicensed person to deal in firearms, based on evidence which at most demonstrated conspiracy to receive stolen firearms in violation of 18 USC §922(j), constituting a fatal variance. The decision is in conflict with this Court's decisions interpreting due process and represents such a departure from accepted and usual course of judicial proceedings so as to call for the exercise of this Court's supervisory powers.

The 5th Amendment to the United States Constitution provides, *inter alia*, that no person shall be deprived of liberty without due process of law. A fundamental component of due process is that a person cannot be convicted upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the person is charged. *In Re Winship*, 397 U.S. 358, 364 (1970).

In the case at bar, the indictment charged Petitioner with conspiring with two other individuals to violate 18 USC §922(a)(1) and §923. There was no evidence adduced at trial, however, to demonstrate that Petitioner conspired to violate those provisions, which require the licensure of persons dealing in firearms. The evidence, viewed in the light most favorable to the government, at most demonstrated an agreement to violate 18 USC §922(j), the receipt of stolen firearms. The decision of the United States Court of Appeals for the Seventh Circuit, in affirming a conviction based on such a fatal variance between the charges and proof, is in conflict with this Court's decision in *In Re Winship*. Further, permitting such a conviction to stand condones a departure from accepted and usual course of judicial proceedings.

In *United States* v. *Goodson*, 502 F.2d 1303 (5 Cir., 1974), the United States Court of Appeals for the Fifth Circuit reversed a conspiracy conviction. The indictment in that case charged the defendants with conspiring to commit the offense of forging or falsely making and altering a United States Treasury check in violation of 18 USC §495. The proof at trial, however, was that the defendants put false endorsements on otherwise valid instruments. The Court found that the divergence between the indictment and proof was not harmless error and required reversal of the defendants' conviction. Similarly, in this case, the failure of the government to prove conspiracy to violate 18 USC §922(a)(1) and §923 requires that Petitioner's conviction on Count 1 be reversed.

The decision of the United States Court of Appeals for the Seventh Circuit also upholds the lower court's determination that the identity of the confidential informant should not be revealed, which ignores the rule articulated by this Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957), creating a conflict with this Court.

The 6th Amendment to the United States Constitution guarantees that in all criminal prosecutions the accused shall enjoy the right to be confronted with witnesses against him. In *Roviaro* v. *United States*, 353 U.S. 53 (1957), this Court addressed the question of when the government must reveal the name of a confidential informant in light of the 6th Amendment requirement of confrontation and cross-examination. This Court concluded that where the disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused or is essential to a fair determination of the cause, the informant's name must be revealed. 353 U.S. at 60-61. Government Exhibit 32 pro-

vided a crucial piece of evidence, which the defendant could have effectively attacked had he been allowed to cross-examine the confidential informant, code name B.J. Dog. The list was particularly crucial because the mere introduction of the list supported otherwise uncorroborated statements from other witnesses that they had seen some sort of a list prepared by Petitioner.

The decision by the United States Court of Appeals for the Seventh Circuit improperly relied on *United States* v. *Lewis*, 671 F.2d 1025, 1026-1027 (7 Cir., 1982) and *United States* v. *Garcia*, 625 F.2d 162, 165 (7 Cir., 1980) to uphold the trial court's denial of Petitioner's motion for disclosure of the confidential informant's name. In *United States* v. *Lewis*, 671 F.2d 1025 (7 Cir., 1982), the Court addressed whether the name of a tipster who provided information which was not incorporated within Internal Revenue Service's reports, should be disclosed. The Court stated that the tipster's name should not be revealed as the tipster was not a key witness, and the information supplied was not even important enough to be incorporated in any of the IRS agent's reports. Similarly, the Court in *United States* v. *Garcia*, 625 F.2d 162 (7 Cir., 1980) determined that the name of the informant did not need to be disclosed as the informant had no direct connection with the substance of the prosecution. The decision of the Seventh Circuit in this case wholly failed to evaluate the different factors and the balancing test articulated by this Court in *Roviaro* v. *United States*. In this case, the information provided by B.J. Dog led to the introduction of a document of dubious reliability which constituted direct proof of Petitioner's violation of the crimes charged. The trial court's determination that the name of the confidential informant should not be revealed,

which was upheld by the Court of Appeals, effectively abrogated Defendant's Sixth Amendment right to confront and cross-examine the witnesses against him.

Finally, Petitioner respectfully suggests that the decision of the United States Court of Appeals for the Seventh Circuit sustaining his conviction based on extensive evidence of extrinsic crimes not committed by Petitioner so far departed from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The test of admissibility, as articulated in Rule 404(b) of the Federal Rules of Evidence, upon which the government relied to introduce the evidence of the various burglaries, is that evidence of other crimes, wrongs or acts is not admissible to show character but is admissible for other purposes. Even if found to be relevant under Rule 404(b), however, exclusion is mandated under Rule 403 of the Federal Rules of Evidence when the probative value of the evidence is overshadowed by the danger of unfair prejudice, confusion of issues, or possibility of misleading the jury.

The decision of the Court of Appeals in this case wholly failed to consider the danger of prejudice inherent in admitting evidence of other crimes, particularly when the other crimes were committed by individuals other than the Petitioner. The Court of Appeals relied on the decision in *United States* v. *West*, 670 F.2d 675 (7 Cir., 1982). However, the court in *West* dealt with evidence of other crimes committed by the defendant in that case, which is different than the situation presented in the case at bar. The introduction of the evidence of burglaries performed by other individuals in Petitioner's case, the prejudice of which outweighs any relevance, violates fundamental fair-

ness. Fundamental fairness is violated in that it is unclear whether Petitioner was convicted on the basis of crimes committed by other individuals or on the basis of evidence of his own acts. Therefore Petitioner respectfully suggests that the introduction of such evidence constitutes such a deviation from accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued May 31, 1983
August 31, 1983.

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-2970 vs.

JAMES GAUDIO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 CR 00406
William T. Hart, Judge.

ORDER

In June 1982, James F. Gaudio and Dennis McKiness were indicted for firearms offenses. Count One asserted that they violated Section 371 of the Criminal Code (18 U.S.C. § 371) by conspiring to engage in the business of dealing in firearms without a license contrary to 18 U.S.C.

§§ 922(a)(1) and 923. Carter Heuton was named as a co-conspirator in Count One but not charged as a defendant, and six overt acts were listed as part of the conspiracy. Count Two asserted that Gaudio violated 18 U.S.C. § 922(a)(1) by dealing in firearms when he was not licensed by the Secretary of the Treasury under 18 U.S.C. § 923. Count Seven charged that Gaudio knowingly received numerous stolen firearms, thus violating 18 U.S.C. § 922(j). He was convicted of the three Counts after a jury trial and received a sentence of three years' imprisonment and a $10,000 fine on Count One, a consecutive term of four years' imprisonment on Count Two, and five years' probation on Count Seven, to run consecutively to the prior terms of imprisonment.

Validity of Conspiracy Count One

Gaudio challenges the validity of conspiracy Count One on several grounds. That Count charged that in violation of 18 U.S.C. § 371 Gaudio, co-defendant McKiness and unindicted Carter Heuton conspired to deal in firearms without the license required by 18 U.S.C. § 923 in contravention of 18 U.S.C. § 922(a)(1) which makes it unlawful for any unlicensed person to engage in the business of dealing in firearms. The grand jury alleged that the conspiracy provided for McKiness and Heuton to steal firearms in Wisconsin and transport them to Gaudio at Austin Motors in Chicago for resale by Gaudio. The overt acts set forth in the indictment charge that: on June 14, 1977, McKiness and Heuton engaged in a Wisconsin burglary and delivered the stolen firearms to Gaudio for a $5,000 check payable to McKiness; six days later Gaudio transferred a 1973 Dodge Charger to Patricia A. Heuton; he sold a .357-caliber Colt revolver between June 14, 1977

and February 13, 1978, and on October 18, 1977, he sold two shotguns.[1]

Gaudio first contends that under *United States* v. *Ford*, 324 F.2d 950 (7th Cir. 1963), Heuton and McKiness could not legally be co-conspirators with Gaudio because they were only engaged in a buyer-seller relationship with him. However, unlike *Ford*, the evidence here showed that Gaudio was regularly receiving stolen weapons from the burglars and selling them in large numbers from his Chicago office. Here there was "a concert of action among two or more persons for a common purpose" rather than "a single transient sales agreement" as in the *Ford* line of cases. See *United States* v. *Mancillas*, 580 F.2d 1301, 1307 (7th Cir. 1978), certiorari denied, 439 U.S. 958; see also *United States* v. *Hess*, 691 F.2d 984, 988 (11th Cir. 1982). The evidence was adequate to support the conspiracy conviction because on the record the jury could find that Gaudio was conspiring with McKiness, Heuton and others to obtain large numbers of stolen firearms to fence.

Gaudio next argues that there was a fatal variance between Count One of the indictment and the proof at trial. But Gaudio incorrectly assumes that because Count One refers to 18 U.S.C. § 923, requiring licenses for firearm dealers and 18 U.S.C. § 922(a)(1), making it unlawful for unlicensed dealers to deal in firearms, they were charged as substantive offenses. To the contrary, the only offense charged is stated at the end of Count One, and alleges a violation of 18 U.S.C. § 371, the conspiracy statute. The

[1] At trial it developed that the Colt revolver was sold to Ronald Simon in the summer of 1977 and the two shotguns were sold to Carmen Trimarco on October 18, 1977.

proof shows that Gaudio, McKiness and Heuton conspired to violate Section 922(a)(1) and engaged in supporting activities, all of which was punishable under 18 U.S.C. § 371. There was thus no variance between the Count One conspiracy charge and the proof.

Finally, Gaudio asserts that Count One of the indictment is duplicitous and multiplicitous. As he points out in brief, duplicity consists of joining in one count of an indictment two or more offenses, and multiplicity consists of charging the same defendant with the same offense in several different counts. This indictment does not contain those defects. As noted with respect to Gaudio's variance argument, Count One only charges a conspiracy (punishable under 18 U.S.C. § 371) to violate 18 U.S.C. § 922(a)(1) making it unlawful for unlicensed dealers to deal in firearms. The only reference to 18 U.S.C. § 923 in Count One is to show that Gaudio was required to be licensed by the Secretary of the Treasury. But even if Count One had two objectives, it would still be valid. As stated in *Braverman* v. *United States*, 317 U.S. 49, 54 (quoting from *Frohwerk* v. *United States*, 249 U.S. 204, 210),

> The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for "The conspiracy is the crime, and that is one, however diverse its objects."

Likewise, there is no multiplicity because Counts Two and Seven charge offenses other than the conspiracy charged in Count One. Instead, Count Two charges him with the substantive offense of dealing in firearms while unlicensed and Count Seven charges him with receiving stolen firearms, both different offenses from the Count One conspiracy.

Identity of the Informant

Government Exhibit 32 was a handwritten list of firearms for sale allegedly written by Gaudio at the request of a government informant who went by the name of B.J. Dog. As part of the foundation for receipt of this exhibit, Officer Rizzardo testified for the government outside the presence of the jury. Officer Rizzardo testified that he had instructed the informant to obtain from defendant a list of firearms for sale in defendant's handwriting. The Officer claimed that Government Exhibit 32 was that list, and that B.J. Dog had told him that it was written in his presence by Gaudio, and voluntarily given to him.

Gaudio argues that he was entitled to cross-examine the informant at trial or outside the presence of the jury to determine whether the list was obtained illegally, and if so, to move to suppress it. In deciding whether to require production of the informant, a court must weigh the need of the accused for the witness against the public interest in protecting the flow of information to the government and protecting the informant from harassment. *United States* v. *Lewis,* 671 F.2d 1025, 1026-1027 (7th Cir. 1982); *United States* v. *Garcia,* 625 F.2d 162, 165 (7th Cir. 1980), certiorari denied, 449 U.S. 923. Here the informant's testimony was relevant only to the preliminary issue of the admissibility of evidence; the informant's testimony did not relate to the guilt or innocence of the defendant. Although defense counsel argues that the informant might have obtained the list illegally by breaking into Gaudio's business, there is absolutely no evidence in the record to support this theory. Cf. *United States* v. *Harper,* 609 F.2d 1198 (6th Cir. 1979) (evidence clearly indicated unlawful entry). However, if in fact the list had been stolen, defendant presumably could have made an offer of proof dis-

puting the informant's version and showing that the list had been taken from him involuntarily at some prior date. In the absence of this offer of proof, and on the record before us, we conclude that the district court did not err in refusing to compel the informant's presence at trial.

Admissibility of Government Exhibit 32

Defendant argues that the foundation for admitting Government Exhibit 32, the handwritten list of firearms for sale, was inadequate. There were several factors supporting the authenticity of this exhibit. First, a handwriting expert testified that it was "probable" that a portion of the list was written by defendant. Second, one witness, Carmen Trimarco, testified that the list looked like one Gaudio had given him, and other witnesses testified about weapons lists that Gaudio kept in his office and handed to his customers. Trimarco also testified about Gaudio's use of such lists in selling guns. Third, Officer Rizzardo testified that he had requested the informant to have Gaudio write out a list of weapons for sale and that subsequently the informant brought Rizzardo such a list (Government Exhibit 32) and told him that Gaudio had written it in the informant's presence and then given it to him. Although this testimony was partly hearsay, that does not vitiate it as foundation testimony; the court is not bound by the hearsay rules in deciding admissibility under Rule 104(a) of the Federal Rules of Evidence. The Advisory Committee's notes on Rule 104(a) show that in passing upon admissibility, the trial judge may use hearsay if, as here, the declarant "so far as appears [has] had an opportunity to observe the fact declared," citing McCormick on Evidence, § 10, p. 19.

In an analogous situation involving the admissibility of statements of co-conspirators, we held that the trial judge should decide their admissibility, with the jury retaining

full responsibility to determine credibility and weight. *United States* v. *Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978). In ruling upon the admissibility of Exhibit 32, Judge Hart relied on the *Santiago* procedure. We agree that the authentication requirement of Rule 901(a) was satisfied because Judge Hart had sufficient evidence before him to find that Exhibit 32 was what the Government claimed it was. *Alexander Dawson, Inc.* v. *National Labor Relations Board*, 586 F.2d 1300, 1302-1303 (9th Cir. 1978); *United States* v. *Wilson*, 532 F.2d 641, 644-645 (8th Cir. 1976), certiorari denied, 429 U.S. 846. The district judge properly admitted the exhibit, leaving the crucial questions of credibility and weight to the jury.

Use of Other Crimes Evidence

Next defendant argues that it was improper for the court to admit evidence with respect to seven or eight burglaries committed by co-conspirators McKiness, Heuton, and two associates. While Rule 404(b) does not permit evidence of other crimes "to prove the character of a person in order to show that he acted in conformity therewith," it does permit evidence of other crimes "for other purposes." Here this evidence was relevant to prove the overt acts charged in Count One by showing that defendant's suppliers obtained their wares by burglaries. In order to prove that defendant was a "dealer" in firearms, the government had to show that defendant received large numbers of guns over a period of time; the evidence of burglaries was also relevant to this issue. In addition, this evidence was admissible with respect to Count Seven, which charged that Gaudio received stolen firearms. Since this testimony was relevant to prove elements of the crimes charged in both Counts One and Seven, it was properly admitted. *United States* v. *West*, 670 F.2d 675, 688 (7th

Cir. 1982), certiorari denied *sub nom. King* v. *United States*, 457 U.S. 1124, and *Jeffers* v. *United States*, 457 U.S. 1139.

Defendant also complains about the government's use of his statement to Heuton and McKiness that if they should get arrested, they need not worry because he had "friends in high places." This evidence was relevant in that it showed defendant was aware that his suppliers were not obtaining their firearms lawfully; it was therefore admissible under Count Seven to show that defendant was knowingly receiving stolen firearms.

Co-Conspirator Heuton's Prior Consistent Statement

Heuton testified on redirect as to statements he made to federal agents in an interview on December 11, 1980. Defense counsel did not object to these statements. Yet the next day when the government decided to call the case agent who had conducted the interview to provide further testimony about the statements made in December 1980, defense counsel objected, arguing that Heuton's prior statements were consistent with his trial testimony and therefore inadmissible. During cross-examination of Heuton, defense counsel noted that his testimony before the grand jury in September 1981 differed from his trial testimony in several respects, and the government attempted to introduce evidence of Heuton's prior consistent testimony to defeat the implied accusation of recent fabrication. Defense counsel argued, however, that as long as the motive to falsify existed at the time of the prior consistent statement—and in this case Heuton was in custody at the time and therefore had an interest in telling the government agents what they wanted to hear—the prior consistent statement should not be admitted. *United States* v. *McPartlin*, 595 F.2d 1321 (7th Cir. 1979), certiorari denied, 444 U.S. 833.

Defendant waived his objection to the agent's testimony. He did not object when Heuton was questioned on the content of his prior consistent statement, and although he objected when the government suggested calling the federal agent, the judge did not rule on the matter at that time, and when the witness was actually called, defense counsel did not object to much of the agent's actual testimony. Instead, defense counsel actually approved of a limited line of questioning, and objected to individual questions that he felt touched on other matters; those objections were sustained. In addition, any error committed by the district judge in admitting the agent's testimony was harmless, since that testimony was similar to the previous, unobjected-to testimony of Heuton.

Imposition of Consecutive Sentences

Defendant challenges the consecutive sentences he received: a three-year imprisonment term under Count One, a consecutive four-year term under Count Two, and five years' probation under Count Seven to run consecutively to both terms of imprisonment. However, Judge Hart was clearly empowered to impose consecutive sentences on the conspiracy Count and on the substantive Counts. *Pereira* v. *United States*, 347 U.S. 1, 11. Moreover, substantive Counts Two and Seven, though brought under the same statutory section, were brought under different subsections, respectively, 18 U.S.C. § 922(a)(1) and § 922(j). Each defines a separate offense, the former prohibiting unlicensed persons from dealing in firearms and the latter prohibiting persons from disposing of stolen firearms. Because each of those offenses required proof of different elements, the consecutive sentences were properly imposed under Counts Two and Seven. *Albernaz* v. *United States*, 450 U.S. 333.

Judgment affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 18, 1983

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 82-2970 vs.

JAMES GAUDIO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 406
William T. Hart, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant James Gaudio, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.